PREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1070

FRANK PETER BALISTRIERI, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

EDWARD BENNETT WILLIAMS
HAROLD UNGAR
WILLIAM E. MCDANIELS
1000 Hill Building
Washington, D. C. 20006
Counsel for Petitioner

Of Counsel:

MAURICE WALSH
29 South La Salle Street
Chicago, Illinois 60603

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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As to Question One

This prosecution followed FBI and IRS investigations closely coordinated by the Organized Crime Division of the Department of Justice. Despite the fact that both agencies employed illegalities in their investiga-

tions and that information flowed freely between them, the government claims to have demonstrated that certain IRS agents, thoroughly blinded to anything going on about them, prepared the prosecution independently of the illegalities. We submit that the acceptability of the government's claim depends on a comparatively low standard of proof. And the court below used the lowest standard defined by the law—substantial evidence.

The government now concedes that the standard employed was too low,[1] but argues that the same result would have followed from use of the proper standard—clear and convincing evidence. We submit that the government cannot possibly know the outcome of a fair judgment which has not yet been made. Remand, not speculation, is the way to determine that question.

The government's suggestion that the different legal formulations of proof standards really do not define

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[1] The government incorrectly asserts that petitioner failed to raise the standards issue below. (Brief in Opposition, 5) In his petition for rehearing, denied without opinion, petitioner directly challenged the substantial evidence standard employed by the court. In support of his position, he relied on both *Chapman* v. *California*, 386 U.S. 18 (1967) and *United States* v. *Schipani*, 289 F. Supp. 43 (E.D.N.Y. 1968). The government states that reliance on *Chapman* and a reasonable doubt standard on dissipation of taint was erroneous, in that the *Chapman* standard applies only to trial errors violative of constitutional rights. However, courts have applied the "harmless error"-reasonable doubt burden to dissipation of taint generally. *People* v. *Johnson*, 4 Cr. L. 3153, 3156-57 (Cal. Sup. Ct., March 3, 1969), citing *People* v. *Spencer*, 66 Cal. 2d 158, 168, 424 P. 2d 715, 722 (1967). See, *Harrison* v. *United States*, 392 U.S. 219, 225 n. 12 (1968). Moreover, in *Schipani*, Judge Weinstein discusses in depth the full range of standards against which dissipation of taint has been measured. 289 F. Supp. at 54-59.

different burdens is patently wrong.[2] The judicial energy spent carving out these standards has not been "much ado about nothing." The instant case exemplifies the importance of the difference between standards. The proposition to be established—that the evidence of the Midwest-Altex relationship, revealed by the illegal search and seizure, was not a product of that seizure, but rather of mail cover leads which (a) did not reveal the interrelationship and (b) lay unexploited for fourteen months until after the illegal seizure—was at least dubious. We suggest that, as to such a proposition, it makes a crucial difference whether the government is to be held to a "clear and convincing" standard or let off with a "substantial evidence" standard.

As to Question Three

Petitioner seeks dismissal of this prosecution on the grounds that the government deliberately intruded into the confidentiality of his relationship with his attorney. The government responds that to adopt petitioner's argument "would mean that in every case where an attorney has been the subject of an electronic surveillance all of his clients would receive immunity from criminal prosecution, even where, as here, the surveillance terminated fifteen months before the in-

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[2] Similarly incorrect is the statement that no conflict exists as to the weight of the burden the government bears to convince a court that its evidence was not obtained in violation of a defendant's constitutional rights. (Brief in Opposition, 8-9) The difference of opinion as to whether proof beyond a reasonable doubt, clear and convincing evidence or some other standard is proper has neither been limited to two circuits nor to the question of coerced confessions. (See authorities cited in the Petition, 14 n. 7.) Indeed, no valid reason exists why one rule should exist for coerced confession cases and another for different constitutional violations. See, *United States* v. *Schipani*, 289 F. Supp. at 58-59.

dictment was returned." (Brief in Opposition, 11) This sweeping assertion misstates the factual and legal issues presented by the petition. The subject of this electronic surveillance was not the attorney but a certain group of his clients among which the government counted the petitioner.[3] Moreover, the government must have known that during the period the bug was operative, the attorney represented petitioner in his tax affairs which were then the subject of investigation and now of prosecution. (Petition, 7-9) Given this type of callous disregard for the right to counsel, the only effective remedy is dismissal. What disposition should be made of prosecutions whose subject matter was not the subject of the attorney-client relationship during the period of the electronic eavesdropping is a question which can be left for other cases.

As to Question Four

The government responds that the petitioner's net worth argument would require the government to establish by direct evidence the siphoning off of funds. (Brief in Opposition, 13) Petitioner takes no such position. The government fails to respond to the position petitioner does take: that there must be proof that the corporations cited as likely sources are capable of producing the additional income or that their business methods are such as to provide the opportunity to siphon out undetectable income. Absent proof of this

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[3] The FBI memorandum concerning the bug on petitioner's attorney relates that it was aimed at that attorney's "Milwaukee hoodlum" connections. (Petition, 8) An earlier memorandum from the FBI dated October 10, 1966, and also concerning electronic surveillance in this case, referred to petitioner as "a Milwaukee hoodlum." (G.A. 252-53)

nature, present in this Court's other net worth decisions, these corporations are not likely sources which the jury could reasonably infer produced the increases in net worth.

Respectfully submitted,

EDWARD BENNETT WILLIAMS
HAROLD UNGAR
WILLIAM E. MCDANIELS
1000 Hill Building
Washington, D. C. 20006
Counsel for Petitioner